C & K PETROLEUM CO.

IBLA 80-566 Decided November 3, 1981

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, denying a protest of the designation of inventory unit WY-040-221 as a wilderness study area.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

   Sec. 603(a) of the Federal Land Policy and Management Act of 1976 directs the Secretary to review those roadless areas of 5,000 acres or more and roadless islands of the public lands, identified during the inventory required by sec. 201(a) as having wilderness characteristics described in the Wilderness Act of Sept. 3, 1964, and from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness.

2. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act -- Words and Phrases

   "Roadless." H.R. Rep. No. 94-1163, 94th Cong., 2d Sess. 17 (1976), provides a definition of "roadless" adopted by the Bureau of Land Management in its Wilderness Inventory Handbook. The word "roadless" refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.

3. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

Bureau of Land Management's practice of designating an area containing roads or other intrusions as a nonwilderness corridor (cherrystem), thereby excluding such area from wilderness review and permitting adjacent lands, otherwise possessing wilderness characteristics, to be studied for their uses, values, and resources, is not an unlawful or prohibited practice in fulfilling the inventory phase of the wilderness review program.

APPEARANCES: Lloyd Meeds, Esq., Washington, D.C., for appellant; Nikki Ann Westra, Esq., Robert Samuel Thompson, Esq., U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management; H. Anthony Ruckel, Esq., Denver, Colorado, for intervenor.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

C & K Petroleum Company (C & K), appeals from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated March 3, 1980, denying its protest of the designation of inventory unit WY-040-221 as a wilderness study area (WSA). 1/ Appellant's protest followed the Acting State Director's designation of unit WY-040-221 and two other areas as WSA's on December 14, 1979. 44 FR 72659 (Dec. 14, 1979). The lands at issue are located within the Overthrust Belt in western Wyoming and occupy some 32,936 acres in Ts. 25-28 N., R. 119 W., sixth principal meridian, Lincoln County.

On May 20, 1980, the Sierra Club sought leave to intervene in the instant appeal, alleging that its members use the lands at issue for

1/ Although counsel for C & K filed a notice of appeal on behalf of Thermal Exploration, Inc. (a wholly-owned subsidiary of Washington Energy Co.), C & K Petroleum Co., and American Quasar Co., no protest was filed by either Thermal Exploration, Inc., or American Quasar Co. The Acting State Director's decision of Dec. 14, 1979, 44 F.R. at 72660, contained the following language:

"Should any protests be filed on any inventory unit the State Director will consider such protest and issue a decision which will be subject to appeal on that inventory unit(s) to the Department of the Interior, Board of Land Appeals (IBLA). If the decision on the protest remains consistent with this decision only the protestant may appeal to the IBLA. If the decision on the protest reflects changes from this decision based upon information submitted by the protestant any adversely affected person(s) may appeal to the IBLA."

The failure of Thermal Exploration and American Quasar to protest the Acting State Director's decision precludes our entertaining an appeal from them. Accordingly, this case is captioned under the name of the only appellant recognized herein, C & K Petroleum Co.

hiking, photography, and other forms of recreation. Sierra Club further alleged that it has been an active participant in BLM's wilderness review process. No objections appearing of record, the Board granted Sierra Club's petition to intervene by order of July 10, 1980. Briefs have been filed by appellant, the Bureau of Land Management, and Sierra Club.

[1] Section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976), directs the Secretary of the Interior to review those roadless areas of 5,000 acres of more and roadless islands of the public lands which were identified during the inventory required by section 201(a) of the Act as having wilderness characteristics described in the Wilderness Act of September 3, 1964, 16 U.S.C. § 1131 (1976). The Secretary is further directed to report to the President from time to time his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness.

The review process undertaken pursuant to section 603(a) has been divided into three phases by BLM: Inventory, study, and reporting. The Acting State Director's designation of unit WY-040-221 as a WSA marks the end of the inventory phase of the review process and the beginning of the study phase.

Key to the inventory conducted by BLM is the definition of "wilderness," as found in section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1976):

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of underveloped [sic] Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

C & K alleges that it holds an interest in oil and gas leases within the boundaries of unit WY-040-221, also known as the Raymond Mountain WSA. In its statement of reasons on appeal, appellant presents four arguments in opposition to the designation of this unit as a WSA:

1. The Raymond Mountain WSA contains three roads and a segment of a fourth road contrary to the provisions of section 603 of FLPMA directing the Secretary to review only roadless areas for wilderness preservation.

2. BLM has improperly ignored six additional roads in the Raymond Mountain WSA by drawing the unit's boundaries in such a way as to exclude these roads from the WSA (cherrystemming).

3. The Raymond Mountain WSA lacks the quality of naturalness and contains substantially noticeable imprints of man's work.

4. The Raymond Mountain WSA lacks outstanding opportunities for solitude or a primitive and unconfined type of recreation.

In appellant's protest of January 14, 1980, it identified nine routes of travel within inventory unit WY-040-221 and contended that these routes should be recognized by BLM as roads. BLM's response to this protest was an acknowledgement that five of these routes and a portion of a sixth were, in fact, roads. BLM maintained, however, that routes identified as White Canyon, Huff Creek Federal-No. 1, Raymond Canyon, and a portion of the Huff Creek Road did not qualify as roads. The White Canyon route, BLM stated, shows evidence of cuts and crude bridge crossings along portions of the route:

> The cut banks are all eroded and well rounded causing any vehicles traveling the route to lean uncomfortably towards the creek bottom. All drainage crossings are wet crossings because any bridges which were once in place are in such a state of disrepair that they afford no aid whatsoever in attempting a crossing * * *. One wheel track of the route is fairly grown over, the other being kept open by trailing livestock. The route is traversable by four-wheel drive about half its total distance and has fallen into such a state of disrepair that it does not qualify as a road.

Decision of Apr. 7, 1981, at 1-2.

BLM described the Raymond Canyon route in similar terms, pointing out that road cuts therein had eroded and wooden bridges had been washed out. These findings caused BLM to conclude that regular maintenance had been neglected. A part of the Huff Creek route was classified as a way because evidence of its construction and maintenance was questionable and, unlie the remaining portion, it was not kept open to serve as access to private and State land. The Huff Lake Federal-No. 1 was described by BLM as a one-quarter mile access route to a drill pad that has been recontoured and reseeded. The route was scheduled for rehabilitation during 1979 and is regarded by BLM as a minor intrusion within the unit.

[2] In its statement of reasons on appeal, C & K argues that White Canyon contains a road that has been improved and maintained by

mechanical means, including a caterpillar tractor and blade. Affidavits accompanying appellant's brief allege that White Canyon road was improved in approximately 1950 in anticipation of logging. 2/ Mechanized vehicles were used to repair and/or maintain the road. The last logging in White Canyon took place in approximately 1955-58. 3/

The significance of appellant's allegation that the White Canyon road has been improved and maintained by mechanical means is to be found in the Wilderness Inventory Handbook issued by BLM on September 27, 1978. 4/ Therein, BLM quoted from H.R. Rep. No. 94-1163 at 17, which set forth the definition of a road adopted by BLM: "The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road." Additional guidance has been provided by BLM in Organic Act Directive (OAD) 78-61, Change 2, in response to the question whether a route is a road if it has been improved to insure relatively regular and continuous use but has not required maintenance as yet. Therein, BLM replies that improvements and relatively regular use would be an indication that the road would be maintained if the need were to arise.

Although appellant alleges maintenance of White Canyon road by mechanical means, it does not state when maintenance was last performed. Logging activities apparently ended in 1958. Since that time, appellant can allege only that the road has been in constant use by hunters, cattlemen, and sheepmen. While the OAD states that such use would be an indication that the road would be maintained if the need were to arise, BLM has effectively rebutted this indication by its statements that the "road" is grown over in parts, contains washed-out bridges, and shows considerable soil erosion. Assuming the truth of appellant's allegations, BLM has correctly characterized the White Canyon route as a way. The lack of maintenance by mechanical means, despite the need for such, precludes the White Canyon route from being classified as a road. To hold otherwise would mean that a route that has at one time been improved and maintained by mechanical means would forever remain a road. Such interpretation, we feel, is contrary to the guidance provided by H.R. Rep. No. 94-1163 and common sense.

A similar set of facts and result are applicable to the "road" in Raymond Canyon. Affidavits submitted by appellant contain allegations that bulldozers were used to improve and maintain this route during the 1940's and 1950's. Logging in this area last occurred during the period 1956-58. 5/ Both forks of this road are presently used for driving cattle and receive annual use by hunters. 6/ BLM notes, however, that despite such improvements and maintenance in the past, this route is in

2/ Affidavit of F. Price at par. 3.
3/ Affidavit of T. W. Price at par. 2.
4/ This handbook is Organic Act Directive 78-61.
5/ Affidavit of J. Etcheverry at par. 6; affidavit of P. Etcheverry at par. 4.
6/ Affidavit of P. Etcheverry at par. 5.

definite need of maintenance. Wooden bridges have been washed out and road cuts have been eroded. In light of the need for maintenance of this route, the failure to maintain this route by mechanical means supports BLM's classification of this route as a way.

The Huff Lake Federal-No. 1, as set forth above, is a one-quarter mile route serving as access to a drill pad used by Gulf Oil Company (Gulf). Appellant notes that Gulf spudded a well in August 1977, which it abandoned in March 1978. BLM's decision of March 3, 1980, states that the route was scheduled to be put to bed during the fall of 1979, but it will be necessary to wait until the summer of 1980 to determine the success of this rehabilitation. This same decision holds that the Huff Lake Federal-No. 1 is not a road, but is regarded as a minor intrusion within the unit. Our discussion infra of the imprints of man within the unit will apply to this intrusion.

Appellant's final dispute with BLM over the existence of roads within the WSA focuses upon the Huff Creek route.

The Huff Creek route was determined by BLM to be part road and part way. In his decision of March 3, 1980, the Acting State Director found that evidence of construction and maintenance is questionable, but that the route is kept open as needed to serve as access to private and State land. That portion serving such access was designated a road. The remainder of the Huff Creek route to Huff Lake was designated a way.

Multiple affidavits accompanying appellant's protest support a finding that Huff Creek roue was mechanically improved and maintained during this century. Some affiants are uncertain as to when mechanical maintenance was last performed. The affidavit of Charles Julian, however, provides a firm basis for finding that mechanical maintenance has taken place regularly on the entire length of Huff Creek route. In his affidavit, Mr. Julian states that he served as County Commissioner for Lincoln County during the period 1967-79. During this period, he supervised road maintenance by county road and bridge crews of Huff Creek Road. Mr. Julian states that during this period Huff Creek Road was maintained by mechanical means, often several times during the year. The affidavit of Russ Dayton, a member of the Lincoln County road and bridge crew, is consistent with Mr. Julian's statements. BLM's decision of March 3, 1980, does nothing to contradict or cast doubt upon the statements of Julian and Dayton. In the absence of a factual basis for BLM's conclusion that evidence of mechanical improvement and maintenance is questionable, we find that the entire length of Huff Creek route extending from the unit's northern boundary to Huff Lake is properly designated a road. 7/ While we note that Huff Creek Road provides access

7/ A redrawing of WSA boundaries is necessary as a result of our finding that the entire length of Huff Creek route should be regarded as a road. Our resolution of this issue and our prior discussion of White Canyon, Raymond Canyon, and Huff Lake Federal-No. 1 "roads" make unnecessary a fact-finding hearing on these matters. Appellant's request for a hearing and prehearing conference is hereby denied as to all issues posed therein.

to State sec. 16, we caution that access is not an inventory consideration. During the inventory phase, a road may be so designated upon a finding of mechanical improvements and mechanical maintenance in accordance with Wilderness Inventory Handbook definitions (at 5). Access forms no part of these definitions.

[3] Appellant's second argument on appeal is the contention that BLM may not ignore roads contained in the WSA by drawing the unit's boundaries in such a way as to exclude these roads from the WSA. This practice by BLM, commonly known as cherrystemming, creates so-called "nonwilderness corridors" containing roads or other intrusions which would seemingly disqualify a parcel from wilderness consideration. This practice is employed when a road enters, but does not bisect, an area otherwise possessing wilderness characteristics.

Appellant argues that cherrystemming is directly at odds with the goals of the Wilderness Act and FLPMA because a visitor seeking wilderness characteristics in an area would encounter nonwilderness corridors at regular intervals running through the area. BLM's cherrystemming practice, appellant continues, makes meaningless the requirement that a WSA be roadless.

BLM's cherrystemming practice has been the subject of a previous appeal before the Board. In National Outdoor Coalition, 59 IBLA 291 (1981), the Board held that BLM did not act unlawfully or contrary to Departmental policy in establishing nonwilderness corridors during the inventory phase of the wilderness review program. Our holding therein was guided by the fact that section 603(a) does not specify any particular shape for an area which may eventually be recommended by the Secretary and the President for inclusion in the National Wilderness Preservation System. What is important in a WSA is that there exists a roadless area of the public lands which meets the requirements of 16 U.S.C. § 1131(c) (1976) for naturalness and provides outstanding opportunities for solitude or a primitive and unconfined type of recreation. An area whose boundaries have been drawn so as to exclude non-bisecting roads or other intrusions qualifies for WSA status assuming sufficient size and wilderness characteristics. Past Congressional action including cherrystemmed areas within the National Wilderness Preservation System supports a finding that the cherrystemming practice is not inconsistent with the Congressional intent behind section 603(a). See, e.g., oversight hearings of the House Subcommittee on Public Lands, Committee on Interior and Insular Affairs (Nov. 27 and 29, 1979) at 55.

[4] Our mention in the preceding paragraph of "naturalness" refers to certain qualities set forth in the definition of wilderness:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who

> does not remain. An area of wilderness is further defined to mean in this chapter an area of underveloped [sic] Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which * * * generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable * * *.

16 U.S.C. § 1131(c) (1976).

Appellant's third argument on appeal focuses upon the concept of naturalness and charges that the Raymond Mountain WSA contains numerous imprints of man's work which are substantially noticeable. Specifically, appellant points to routes of travel in White Canyon and Raymond Canyon, inter alia, and also to a television translator, phosphate mine shaft, recontoured well site, fences, dams, bridges, and the effects of past logging operations. These impacts, counsel argues, deprive the area of the degree of naturalness required for WSA designation. Photographs of these intrusions accompany appellant's statement of reasons.

In response to appellant's statement of reasons, counsel for BLM call our attention to H.R. Rep. No. 95-540, 94th Cong., 2d Sess. 6 (1977). This report was prepared to accompany H.R. 3454, later enacted as the Endangered American Wilderness Act, 16 U.S.C. § 1132 (Supp. II 1978). This report lists several examples of intrusions which may be allowed in a designated wilderness area. Among these are trails, trail signs, bridges, fire towers, fire breaks, fire suppression facilities, pit toilets, fisheries enhancement facilities, fire rings, hitching posts, snow gauges, water quantity and quality measuring devices, and other scientific devices. Based on this guidance, BLM has set forth in its Wilderness Inventory Handbook examples of intrusions found on the public lands which, it finds, may be present within a WSA. These additional items include research monitoring markers and devices, wildlife enhancement facilities, radio repeater sites, air quality monitoring devices, fencing, and spring development.

The examples cited above from the handbook as being tolerable intrusions within a WSA specifically include bridges and fencing, two items which appellant claims deprive the Raymond Mountain WSA of naturalness. The remaining intrusions, BLM found, were not substantially noticeable imprints of man's work. Counsel for BLM argue, correctly we believe, that a WSA need not be free of all intrusions. Naturalness, counsel continue, is present in a WSA if the area "generally appears to have been affected primarily by the forces of nature with the imprint of man's work substantially unnoticeable." (Emphasis added.) Counsels' position is supported by section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1976). The underscored language, taken verbatim from section 2(c), illustrates the highly subjective judgment which BLM must make in determining whether an area possesses the quality of naturalness. In the present case, this judgment was entrusted

to Bureau personnel, including a forester, range technician, and outdoor recreation planner, whose reports evidence firsthand knowledge of the land. Assisting BLM were comments from numerous groups and individuals whose interests span a broad spectrum. BLM's judgment in such matters, we feel, is entitled to great deference. Such deference will not be overcome by an appellant expressing simple disagreement with a subjective conclusion of BLM. This is not to suggest that we abdicate our review of subjective wilderness judgments. As the delegate of the Secretary's review authority, such abdication would be improper. We do mean to suggest, however, that an appellant seeking to substitute its subjective judgments for those of BLM has a particularly heavy burden to overcome the deference we accord to BLM in such matters. Appellant's arguments and photographs submitted on appeal have not met this burden. Richard J. Leaumont, 88 I.D. 490, 491, 54 IBLA 242, 245 (1981).

In its final argument on appeal, C & K challenges BLM's finding that the Raymond Mountain WSA possesses outstanding opportunities for solitude or a primitive and unconfined type of recreation. BLM's decision of March 3, 1980, offered the following comments on these subjects:

> Outstanding Opportunities for Solitude or Primitive and Unconfined Type of Recreation: Public input, including your protest rationale and information collected by BLM personnel, has been carefully considered in arriving at the following determinations.
>
> Solitude: It has been determined that, because of the steepness of the ridges and canyons with the accompanying vegetation, the area contains many secluded spots where one could avoid the sights and sounds of others within the unit. Therefore, outstanding opportunities for solitude exist within the unit.
>
> Primitive and Unconfined Recreation: It has been determined that the Raymond Mountain unit offers outstanding opportunities for hiking, backpacking, fishing, hunting, and many other types of recreation.

In response, appellant charges that the sights and sounds of trucks and trains beyond WSA boundaries can be discerned at all hours of the day and night from at least half of the WSA. Such a situation, counsel argues, prevents outstanding opportunities for solitude. Affidavits incorporated in appellant's statement of reasons state that the southwest portion of the unit lacks outstanding opportunities for a primitive and unconfined type of recreation because the area lacks water and consists only of hills, mountains, and sagebrush.

Examination of a topographic map confirms the Acting State Director's statement that the area contains steep ridges and canyons where

solitude might be found within the unit. We note also that in describing the traffic on Huff Creek Road caused by "cattlemen, sheepmen, hunters, fishermen, game wardens, and others" 8/ appellant confirms the notion that opportunities for primitive and unconfined recreation exist in the WSA. The presence of a rare strain of Utah or Bear River cut-throat trout further supports this view.

Whether these opportunities for solitude or a primitive and unconfined type of recreation are outstanding, as required by 16 U.S.C. § 1131(c) (1976), is the real issue on appeal. This issue obviously calls for a subjective judgment by those familiar with the land. In this respect, the issue is similar to the question discussed above whether the unit possesses the quality of naturalness. Our resolution of this issue follows similar lines. We believe that BLM's judgment as to whether a unit possesses outstanding opportunities for solitude or a primitive and unconfined type of recreation is entitled to great deference. By this statement, we do not mean to imply that BLM's judgment will be immune from review. To the contrary, BLM's documentation for its judgments will be carefully studied, as will the documentation of an appellant. An appellant will have a particularly heavy burden to support a reversal of BLM's subjective conclusions. We cannot say that appellant has met this burden on the issue of the unit's outstanding opportunities for solitude or a primitive and unconfined type of recreation.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Acting State Director is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Bruce R. Harris
Administrative Judge

8/ Affidavit of A. Teuscher at par. 3.